MOTION FILED

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(65)

No. 05-184

IN THE

Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD H. RUMSFELD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE OUT OF TIME BRIEF OF *AMICI CURIAE* SCOTT L. FENSTERMAKER, ESQ., JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, JOHN DOE 6, JOHN DOE 7, AND JOHN DOE 8 IN SUPPORT OF JURISDICTION AND BRIEF *AMICI CURIAE*

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NOTICE OF MOTION

Amici Curiae Scott L. Fenstermaker, Esq., John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, and John Doe 8 (hereinafter "Johns Doe") hereby move this court for permission to file an *Amici Curiae* brief in opposition to respondents' motion to dismiss for lack of jurisdiction.

STATEMENT OF FACTS RELEVANT TO MOTION

Amici Curiae Fenstermaker and Johns Doe are currently petitioners in a matter pending, but stayed, before the United States District Court for the Southern District of New York, 05 CV 7468 (RMB) (the "John Doe matter"). The John Doe matter, filed by *Amicus Curiae* Fenstermaker in August of 2005 *pro se*, and as next friend of Johns Doe, seeks a writ of *mandamus* directing Respondents George W. Bush, Donald H. Rumsfeld, and John D. Altenburg, Jr. to provide, among other things, attorneys for Johns Doe as well as relief unrelated to the *Hamdan* matter.

President Bush determined, on or before July 18, 2004, that Johns Doe are "subject to" his November 13, 2001 military order (the "Order"). The Order establishes the military cor missions that are at the heart of Salim Ahmed Hamdan's pending petition for a writ of *certiorari*. Upon President Bush's determination, Johns Doe were arrested and segregated at a prison at Guantánamo Bay, Cuba dedicated to housing detainees who have been determined to be "subject to" the Order. Unlike Mr. Hamdan, Johns Doe have never been charged with a crime or crimes by the Appointing Authority to the Military Commissions, John D. Altenburg, Jr. nor have they been afforded counsel, notwithstanding the fact that they have been arrested and detained under suspicion of committing war crimes for over 19 months.

On November 29, 2005, respondents in the John Doe matter filed a motion to dismiss on the grounds that *Amicus Curiae* Fenstermaker was not a proper "next friend" of Johns Doe, that *Amicus Curiae* Fenstermaker could not assert *jus tertii* standing to sue on behalf of Johns Doe, and other grounds unrelated to this motion. In the alternative, respondents in the John Doe matter moved for a change of venue to the United States District Court for the District of Columbia on the ground that the John Doe matter was properly characterized as a petition for a writ of *habeas corpus* rather than a petition for *mandamus* relief.

On February 3, 2006, petitioners in the John Doe matter filed their response brief with the district court. On February 15, 2006, less than eighteen hours prior to a conference scheduled by the district court to discuss the Detainee Treatment Act of 2005, Pub. L. 109-148, §§1001-1006 (the "Act"), respondents in the John Doe matter filed a letter motion seeking a stay, pending this Court's decision in *Hamdan*, 05-184. On February 16, 2006, the district court effectively granted respondents' motion to stay the proceedings in the John Doe matter by dismissing respondents' motion to dismiss, without prejudice, and holding that no further action would be taken on the John Doe matter, pending this Court's resolution of Mr. Hamdan's petition.

Amicus Curiae Fenstermaker wrote counsel for both parties seeking permission to file an *Amici Curiae* brief. Counsel for respondents responded orally by denying permission on the ground that permission was requested out of time. Counsel for petitioner has not responded.

ARGUMENT IN SUPPORT OF MOTION

The Court should grant *Amici Curiae's* motion seeking leave to file a *Amici Curiae* brief. The parties to the instant matter, while thoroughly briefing the issues underlying the Act, and its potential applicability, or lack thereof, to Mr. Hamdan's matter, have not alerted this Court to the interplay between the Act, the Order, and the Combatant Status Review Tribunal process. The purpose of *Amici Curiae's* brief is to illuminate the processes established by the Order and explain how the Act, when coupled with the Order, grants unfettered discretion to the President, Secretary of Defense, and the Appointing Authority to the Military Commissions to effectively deny any review, or even counsel, to those individuals President Bush orders arrested pursuant to the Order.[1]

Amici Curiae's motion, while filed late, is timely filed because *Amici Curiae* Fenstermaker and Johns Doe have taken the reasonable position in the district court that the Act does not apply to the John Doe matter because that matter does not seek *habeas* relief, nor does it relate "to any aspect of the detention by the Department of Defense of [Johns Doe] at Guantanamo Bay, Cuba." See the Act, §1005(e)(1). Hence, this motion to file an *Amici Curiae* brief only became ripe on February 16, 2006 when the District Court granted respondents' motion for a stay of the John Doe matter pending resolution of the *Hamdan* matter.

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[1] Although Combatant Status Review Tribunals ("CSRTs") are not before the Court, the same concerns raised by the Act's effect on military commissions are also raised by the Act's effect on CSRTs.

Respectfully submitted,

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INTRODUCTION TO BRIEF[1]

Respondents moved to dismiss the instant petition on the ground that the Detainee Treatment Act of 2005, Pub. L. 109-148, §§1001-1006 (the "Act") eliminates this Court's jurisdiction to hear the matter. Scott L. Fenstermaker, Esq., John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, and John Doe 8 (collectively "Johns Doe"), petitioners in 05 CV 7468 (RMB) (hereinafter "the John Doe matter"), currently pending, but stayed, in the United States District Court for the Southern District of New York, as *Amici Curie*, ask the Court to deny respondents' motion on the ground that the Act is unconstitutional.

INTEREST OF AMICI

Amici Curiae Johns Doe are aliens currently detained by the Department of Defense at Guantánamo Bay, Cuba. On or before July 18, 2004, President Bush deemed Johns Doe "subject to" his November 18, 2001 military order (hereinafter "the Order").[2] Pursuant to Section 3(a) of the Order,[3] Johns Doe were arrested, segregated from the general prison population at Guantánamo Bay, held in solitary confinement without charges, attorneys, or even being informed that President Bush deemed them "subject to" the Order and that they, as a result, face the possibility of life imprisonment or the death sentence.

Amici Curiae Fenstermaker and Johns Doe are currently petitioners in the John Doe matter. The John Doe matter, filed by *Amicus Curiae* Fenstermaker in August of 2005 *pro se* and as next friend of Johns Doe, seeks a writ of

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[1] None of the parties have participated in the preparation or financing of this brief.

[2] *See* Respondents' brief, Appendix, 12a-18a.

[3] "[a]ny individual subject to this order shall be (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States; . . . ." The Order, section 3(a).

mandamus directing Respondents George W. Bush, Donald H. Rumsfeld, and John D. Altenburg, Jr. to provide, among other things, attorneys for Johns Doe as a result of their lengthy arrest and incarceration without charges, as well as relief unrelated to the *Hamdan* matter.

Respondents' position that the Act "reallocates" federal jurisdiction involving suits, of any nature, brought on their behalf, if accepted by this Court, would deprive *Amici Curiae* Johns Doe of any ability, of any nature and in any forum, to seek redress for their situation at Guantánamo Bay, regardless of whether their petition is cast as a *habeas* petition, a *mandamus* petition, or in any other form. As respondents' position means that *Amici Curiae* Johns Doe may spend the rest of their lives incarcerated at Guantánamo Bay without so much as a hearing, being afforded counsel or informed of their status as "subject to" the Order, they are sufficiently interested in the pending petition.

SUMMARY OF ARGUMENT

Respondents', in their motion to dismiss, clearly take the position that the federal court system now lacks jurisdiction to hear any suit involving an alien detained at Guantánamo Bay unless the suit falls within the realm of permissible actions defined in Sections 1005(e)(2) and (3) of the Act. As Sections 1005(e)(2) and (3) of the Act only grant jurisdiction "to determine the validity of any final decision of a Combatant Status Review Tribinal that an alien is properly detained as an enemy combatant" and "to determine the validity of any final decision rendered pursuant to Military Order No. 1, dated August 31, 2005," individuals either detained or affected by their status at Guantánamo Bay under other circumstances arguably have no right to petition any court challenging their plight.

Because the Order requires that individuals deemed "subject to" the Order be, in effect, arrested,[4] and neither the Order, Military Order No. 1, nor any other procedure or rule resulting therefrom provide for a right to timely charges, speedy trial, or an expeditious appeal process, the Act does little more than vest the power to suspend the writ of *habeas corpus* and the ability to file for alternative relief in the hands of the President and his subordinates in the Department of Defense. This delegation violates the Suspension Clause as well as Hamdan's and Johns Doe's rights to Due Process of Law. Furthermore, because the Act is limited to aliens and based solely upon the location of their detention, it violates Hamdan's and Johns Doe's equal protection rights.

STATEMENT OF FACTS

On November 13, 2001, President George W. Bush promulgated a Military Order (the "Order"), establishing military tribunals to try offenses purportedly violating the law of war. See the Order, 66 Fed. Reg. 57,833. The Order grants unlimited discretion to President Bush to determine that individuals are "subject to" the Order and have them arrested and detained, pending the filing of charges. See the Order, Section 3(a). Neither the Order nor any of the rules, regulations or procedures established pursuant thereto provide for any rights to speedy charges, arraignment, trial, appeal or "final decision." Furthermore, the Order and associated rules do not give those detainees deemed "subject to" the Order and therefore arrested and detained, right to counsel until "sufficiently in advance of trial to prepare a defense" to the underlying charges.[5]

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[4] See the Order, section 3(a). "[a]ny individual subject to this order shall be (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States; . . . ."

[5] Military Commission Order, No. 1, Paragraph 5.D.

No later than July 18, 2004, President Bush deemed eight individuals "subject to" the Order, had them arrested, held at Guantántamo Bay, Cuba, where at least five,[6] and perhaps all,[7] of them remain in solitary confinement, awaiting the filing of criminal charges, without counsel and without so much as being informed that they are "subject to" a military justice system that could ultimately lead to the imposition of a life sentence or the death penalty.

On August 24, 2005, *Amicus Curiae* Scott L. Fenstermaker, a criminal defense attorney in Manhattan and a member of the Pool of Qualified Civilian Defense Counsel, the group of 13 civilian attorneys pre-qualified by the Department of Defense to represent individuals charged pursuant to the Order, filed suit in the United States District Court for the Southern District of New York,[8] seeking, among other things, to have counsel appointed for these eight individuals or, in the alternative, to have President Bush's determination that they are "subject to" the Order, rescinded. That petition, currently pending, but stayed, refers to these individuals as "Johns Doe."

On Thursday, February 16, 2006, the Honorable Richard M. Berman, United States District Judge, SDNY, granted respondents' motion in the John Doe matter to stay the proceedings pending this Court's decision on the government's motion to dismiss petition 05-184 as a result of the Act's purported effect of stripping the federal court

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[6] The John Doe matter was filed in August of 2005, when 8 individuals remained "subject to" the Order without being charged. On November 5, 2005, five individuals were charged by the Appointing Authority to the Military Commissions. Apparently only 3 of those 5 detainees are possibly among the eight Johns Doe.

[7] It is unclear if any of those 3 individuals charged on November 5, 2005 and who may be among Johns Doe are indeed among Johns Doe, as the authorities have repeatedly refused to identify Johns Doe to *Amicus Curiae* Fenstermaker.

[8] 05 CV 7468 (RMB) (SDNY).

system of jurisdiction over Mr. Hamdan's matter and suits like that brought by Mr. Fenstermaker and Johns Doe.

THE ACT

The Act apparently seeks to strip the federal court system of jurisdiction over suits brought by, or behalf of, aliens detained at Guantánamo Bay, while reserving circumscribed jurisdiction to the United States Court of Appeals for the District of Columbia Circuit to hear limited, discrete matters involving final determinations of Combatant Status Review Tribunals and military commissions. Section 1005(e) of the Act modifies 28 U.S.C. §2241, by adding subsection (e) thereto. This modification provides that

> "no court, justice, or judge shall have jurisdiction to hear or consider -- (1) an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantánamo Bay, Cuba, who -- (A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of [the Act] to have been properly detained as an enemy combatant."

The Act limits the jurisdiction of the United States Court of Appeals for the District of Columbia Circuit to determinations that a detainee is an "enemy combatant" or "for whom a final decision has been rendered pursuant to such military order." See the Act, §§1005(e)(2)(C) and (e)(3)(C). As a result of this jurisdiction-limiting provision, the Act, on its face, arguably strips federal courts of jurisdiction of challenges brought by, or on behalf of,

detainees at Guantánamo Bay who are being held in custody for reasons other than, or in addition to, (1) having been determined to be "enemy combatants" by a Combatant Status Review Tribunal, or (2) who have not been found guilty of a war crime or war crimes by a military tribunal. *Amici Curiae* Johns Doe unquestionably are such detainees. Respondents conveniently ignore Johns Doe and their plight in their brief and reply papers in arguing for dismissal of Mr. Hamdan's petition based upon the Act's jurisdiction-limiting provisions.

JOHNS DOE

President Bush determined that Johns Doe were "subject to" his November 13, 2001 military order on or before July 18, 2004. As a result of that determination, they were arrested, segregated from the general prisoner population at Guantánamo Bay, and placed in Camp Echo, a prison camp located at Guantánamo Bay that is dedicated to housing prisoners "subject to" the Order. Upon information and belief, they are held in solitary confinement.

Johns Doe have never been provided counsel or informed of the fact that they have been arrested pending the filing of criminal charges for which they may face life imprisonment or the death penalty.

Three of the Johns Doe may have been charged on November 5, 2005. However, because of the government's secrecy policy involving the military commissions and the identities of those subject to those commissions, it is unclear whether any of the individuals charged on November 5, 2005 are among the eight Johns Doe. Hence, at least five, and perhaps all, Johns Doe have never been charged, notwithstanding the fact that they were arrested over 19 months ago and segregated in a dedicated prison at Guantánamo Bay.

SALIENT PROCEDURAL ISSUE

The respondents seek to dismiss the *Hamdan* petition on the ground that the Act strips this Court of jurisdiction to rule on the matter. Setting aside, for the moment, the concern raised by allowing a litigant to strip a court of the jurisdiction to hear a pending case in which he, she, or it, may suffer adverse consequences, this interpretation of the Act creates an untenable situation ripe for abuse by the executive branch. It further calls into question the independence of the federal judiciary and its role in maintaining the checks and balances which have, for over 215 years, protected this country from overreaching by the political branches of government.[9]

The Act purports to strip federal courts of jurisdiction to hear most suits brought on behalf of aliens detained by the military at Guantánamo Bay. Notwithstanding this destruction of federal court jurisdiction, the Act, on its face, creates the illusion of permitting judicial review for two categories of Guantánamo Bay detainees. First, a detainee may challenge a Combatant Status Review Tribunal's determination that he is an "enemy combatant." In addition, a detainee may challenge "any final decision rendered pursuant to Military Commission Order No. 1, dated August 31, 2005." Aliens detained at Guantánamo Bay who fall outside of these two limited categories are, if the respondents' position is upheld, left without recourse. *Amici Curiae* Johns Doe are so held.

If the government's broad reading of the Act is upheld by this Court, a detainee who seeks to challenge a condition other than a Combatant Status Review Tribunal's

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[9] *See United States v. Klein*, 80 U.S. 128, 147 (1872) ("It is the intention of the Constitution that each of the great co-ordinate departments of the government – the Legislative, the Executive, and the Judicial – shall be, in its sphere, independent of the others.")

determination that he is an enemy combatant or his final determination by a military commission that he has committed one or more war crimes, has no forum in which to bring that challenge. *Amici Curiae* Johns Doe are held under just such circumstances.

The Order mandates that "[a]ny individual subject to this order shall be (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States; . . . ." The Order, Section 3(a). Hence, if President Bush determines that a detainee is "subject to" the Order, he is arrested and held in custody even if (1) he is not determined to be an enemy combatant, or (2) the determination that he is an enemy combatant is reversed by the United States Court of Appeals for the District of Columbia Circuit, pursuant to the Act, section 1005(e)(2). Furthermore, as the Order and associated rules, regulations and procedures do not provide for a requirement that a "subject to" detainee be expeditiously charged, tried, or provided with a final military commission determination, the interplay between the Act and the Order lead to the potential of indefinite detention at the hands of the executive unhindered by judicial oversight.[10] *Amici Curiae* Johns Doe are proof positive that this potential abuse is far from academic.

This may not be a problem, if Johns Doe are ultimately charged and tried by a military commission. If they are acquitted, then they should be released, unless held as enemy combatants pursuant to a final determination of a Combatant Status Review Tribunal, a determination that may be challenged pursuant to the Act. If convicted, then they may appeal their convictions, once they become final, pursuant to the procedures provided for in the Act,

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[10] *See Klein*, 80 U.S. at 145, *supra*. ("But the language of the proviso shows plainly that it does not intend to withhold [] jurisdiction except as a means to an end.")

§1005(e)(3). However, if like Johns Doe, detainees are detained pursuant to the Order, but never charged, the Act arguably guarantees that the detainee will have no recourse, if this Court upholds respondents' position articulated in their motion to dismiss.

While it is unclear whether this loophole was created purposefully to enable the President and the Department of Defense to hold people at Guantánamo Bay indefinitely, it is clear that this possibility exists. Johns Doe exemplify just such detainees. The review procedure provided in the Act leads one to conclude that Congress did not intend to create this potential human "black hole" operated under United States military jurisdiction

LEGAL ARGUMENT

Respondents' motion papers repeatedly argue that the Act does not eliminate federal jurisdiction, it merely reallocates it. That argument is nonsense and either belies an ignorance of the rules surrounding the military commissions, or a disingenuous desire on the part of respondents to mislead this Court in the hope that the Court will overlook the real possibility that Guantánamo detainees, like *Amici Curiae* Johns Doe, will be held indefinitely without charges, counsel or recourse.

Respondents' reply papers cite *Fisher v. Gibson*,[11] and *Swain v. Pressley*,[12] for the proposition that Suspension Clause litigation must prove a remedy "inadequate" or "ineffective" before legislation suspending the writ of *habeas corpus* is deemed to violate the law. *Fisher*, *Swain* and the existence of Johns Doe make concrete Mr. Hamdan's position that the Act unconstitutionally eliminates *habeas* jurisdiction. In *Fisher*, the salient issue was "'whether the

[11] 262 F.3d 1135 (10th Cir. 2001).
[12] 430 U.S. 372 (1977).

one-year limitation period violates the Suspension Clause depends upon whether the limitation period renders the habeas remedy 'inadequate or ineffective' to test the legality of detention.'"[13] Understandably, the *Fisher* court did not find a one-year statute of limitations period to render *habeas* relief "inadequate or ineffective." Similarly, in *Swain*, the statute in question, by its very terms, permitted "the District Court to entertain a habeas corpus application if it 'appears that the remedy by motion is inadequate or ineffective to test the legality of [the applicant's] detention.'"[14] Hence, in *Swain*, the statute under attack, by its very terms, granted *habeas* petitioners adequate review, should the statutory review prove either "inadequate" or "ineffective."

The Act, on the other hand, provides Johns Doe with no review, "adequate," "effective," or otherwise. Unless President Bush, Secretary of Defense Rumsfeld, or the Appointing Authority, Mr. Altenburg, decide, in their unfettered discretion, to charge Johns Doe, they may never be released. Clearly, a detainee "subject to" the Order cannot receive a "final decision" pursuant to Military Order No. 1 unless that detainee is first charged. Unlimited discretion to charge is left up to President Bush and his subordinates. Without a final decision, the detainee cannot obtain judicial review. If the Act is read as respondents would have this Court, the availability of the review mechanisms set up by the Act rests solely in the hands of members of the executive branch. Our Constitution and our system of government were created with a system of checks and balances designed to avoid just this result.[15]

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[13] 262 F.3d at 1145, *quoting Miller v. Marr*, 141 F.3d 976, 977 (10th Cir. 1998).

[14] *Swain v. Pressley*, 430 U.S. 372, 381 (1976), *quoting* §23-110(g) of the District of Columbia Code.

[15] *See* note 9, *supra*.

As stated in petitioner's response to respondents' motion to dismiss, the Act clearly violates Hamdan's and Johns Doe's equal protection rights because it applies only to aliens and is based solely on the location of their detention. Furthermore, if read literally, the Act would grant the executive the ability to take aliens detained in immigration holding facilities within the United States, transport them to Guantánamo Bay, and then summarily deport them, without holding permissible deportation proceedings that comport with due process. Furthermore, the Act does not seem to provide remedy to an alien abducted off the streets of any city, town, or neighborhood within the United States, who then faces rendition to Guantánamo Bay via military, or other, transport. to be held in custody without being provided a Combatant Status Review Tribunal or trial by military commission. Respondents cannot contest that these circumstances are anything but the natural result of respondents' arguments regarding the Act's effect.

The other cases analyzing jurisdiction-altering statutes cited by respondents are clearly distinguishable. With only one exception,[16] these cases all clearly reallocate jurisdiction within the federal or state judiciary. Furthermore, respondents cite no case upholding the constitutionality of a statute divesting the federal court system of jurisdiction over *habeas* or alternative *mandamus* petitions, where such divestiture rested on the citizenship of a litigant and place of detention of the petitioner.

CONCLUSION

Respondent's proposed interpretation of the Act, if upheld by this Court, creates the possibility that the President and his subordinates in the Department of Defense could hold detainees at Guantánamo Bay indefinitely, without hearing, trial, or recourse to the federal court system.

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[16] *See Hallowell v. Commons*, 239 U.S. 506 (1916).

As a result, the Act is unconstitutional. If the Court grants respondents' motion to dismiss based upon the Act, the Court should explicitly limit its holding to the facts of Mr. Hamdan's case and not preclude challenges brought by detainees held indefinitely without final determinations by either Combatant Status Review Tribunals or military commissions.

Respectfully submitted,

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